PHILOMENA DOOLEY, ET AL.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

[illegible] CERTIORARI TO THE UNITED STATES [illegible] OF COLUMBIA CIRCUIT

[illegible]

[illegible] CO., LTD.

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether, in light of *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the pecuniary damage standard of the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.*, may be supplemented with nonpecuniary damages for pre-death pain and suffering on the basis of general maritime law?

LIST OF ALL PARTIES AND RULE 29.6 LISTING

A. Petitioners

The Petitioners are (1) Philomena Dooley, personal representative of the estate of Cecelio Chuapoco, (2) Carl Cole, personal representative of the estate of Woon Kwang Siow and (3) Kimberly S. Saavedra, personal representative of the estate of Jan Hjalmarrson, who were the plaintiffs-appellants in the Court of Appeals. The action by Robert Boyar, executor of the estates of Michael Truppin and Jan Moline, which was part of the consolidated appeal below, has now been settled and no longer is involved.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Korea Co., Ltd.
Hanjin Construction Co., Ltd.
Hanjin Engineering & Construction Co., Ltd.
Hanjin Heavy Industry Co., Ltd.
Hanjin Information System & Telecommunications Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Leisure Co., Ltd.
Hanjin Shipping Co., Ltd.
Hanjin Transportation Co., Ltd.
Hanjin Travel Service Co., Ltd.
Inha General Hospital
Inha University Foundation

Jedong Industries Ltd.
Jungsuk Enterprise Co., Ltd.
Jungsuk Foundation (Hankuk Aviation College)
Kal Development Co., Ltd.
Keoyang Shipping Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Tacoma Marine Industries Ltd.
Korean French Banking Corporation Sogeko
Oriental Fire & Marine Insurance Co., Ltd.
Pyunghae Mining Development Co., Ltd.

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OPINIONS BELOW AND JURISDICTION

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is satisfied with Petitioners' statement of the citation of the opinions and orders of the courts below and the basis for jurisdiction in the Court. Petitioners' Brief on the Merits ("Petitioners' Brief") at 1-2.

STATUTORY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.* ("DOHSA"). The pertinent provisions of DOHSA are set forth in the Appendix hereto at RA 1. References preceded by "RA" refer to pages in the Appendix hereto.

STATEMENT OF THE CASE

A. Nature of the Case

This litigation arises from the crash in international waters of KAL flight KE007 on September 1, 1983, when Soviet military aircraft shot down flight KE007 while en route to Seoul, South Korea from Anchorage, Alaska. All 269 persons on board the aircraft were killed. The case previously was before the Court on two occasions. *See Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989).

The case at this stage involves only the legal question whether nonpecuniary damages for pre-death pain and suffering are recoverable under the applicable law of the United States for the deaths of three passengers on KAL flight KE007. The deaths of the decedents involved occurred on the high seas within the meaning of DOHSA, during the course of international transportation by air within the meaning of the Warsaw Convention.[1] Petitioners seek to recovery pecuniary

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No.

and nonpecuniary damages on behalf of the estates of the three deceased passengers and various surviving relatives.

B. The Proceedings in the District Court

1. The Pre-*Zicherman* Rulings of the District Court

In 1993, following the conclusion of the multidistrict liability proceedings,[2] KAL moved in 24 individual cases, pending in the district court and awaiting damage trials, for a determination, *inter alia*, that the types of recoverable damages are governed exclusively by DOHSA and that Petitioners, therefore, were not entitled to recover any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *See* 46 U.S.C. app. § 762 (RA 1). By Memorandum Opinion and Order, filed April 8, 1993, the district court denied KAL's pre-trial motion. *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (JA 58). The district court found that, although both DOHSA and the Warsaw Convention apply to these actions, DOHSA was not the exclusive remedy as to recoverable damages. (JA 59). The district court, therefore, allowed Petitioners to pursue the recovery of nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *Id.* The district court based its decision on the notion that these types of nonpecuniary damages are recoverable under Article 17 of the Warsaw Convention as "damage sustained." *Id.*[3]

876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention").

[2] The liability of KAL was determined in the context of multidistrict litigation proceedings in the district court below. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

[3] The district court, in four other actions that were tried subsequently, held that nonpecuniary damages for survivor's grief are not recoverable under the Warsaw Convention as a matter of law. *See Forman v. Korean Air Lines*, No. 83-3578 (D.D.C. June 6, 1995) (Memorandum Opinion and Order), *aff'd and rev'd in part*, 84 F.3d 446 (D.C.

2. The Decision of the Court in *Zicherman*

While the cases herein were pending and awaiting damage trials in the district court, the Court decided *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996)[4] and rejected the notion that any type of damages are recoverable directly under the Warsaw Convention as "damage sustained." *Zicherman*, 516 U.S. at 222-29. The Court explained that "damage sustained" in the context of Article 17 of the Convention refers to "legally cognizable harm" and that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 230.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 229. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

Cir.), *cert. denied*, 117 S. Ct. 582 (1996); *Oldham v. Korean Air Lines*, 1994 WL 725277 (D.D.C. Oct. 11, 1994), *aff'd and rev'd in part*, 127 F.3d 43 (D.C. Cir. 1997); *Ocampo v. Korean Air Lines*, 1994 WL 731569 (D.D.C. Sept. 16, 1994), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, 127 F.3d 43 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3492 (U.S. Mar. 9, 1998) (No. 97-1180); *Maikovich v. Korean Air Lines*, No. 83-3792 (D.D.C. Nov. 14, 1994) (Memorandum Opinion and Order), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, 127 F.3d 43 (D.C. Cir. 1997).

[4] The damage trials had been stayed by the district court pending the Court's decision in *Zicherman*.

The governing law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.* at 229-30; 46 U.S.C. app. § 762 (RA 1). The Court stated that, where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages for loss of society (the only question before the Court in *Zicherman*). 516 U.S. at 229-31. The Court, therefore, concluded that nonpecuniary damages for loss of society were unavailable. *Id.* The Court, however, noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 230 n.4.

3. The Post-*Zicherman* Decision of the District Court

Following the Court's decision in *Zicherman*, KAL moved the district court to dismiss all claims for nonpecuniary damages in those cases still awaiting damage trials. KAL argued that the holding and rationale of the Court in *Zicherman* precludes the recovery of any nonpecuniary damages, including pre-death pain and suffering damages. Petitioners argued that pre-death pain and suffering damages were recoverable pursuant to a general maritime law survival action, or under Korean law pursuant to § 764 of DOHSA.[5]

The district court granted KAL's motion and dismissed all claims for nonpecuniary damages finding that, in light of *Zicherman*, nonpecuniary damages no longer are recoverable in these cases. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) ("*In re KAL-DDC II*") (JA 77). The district court, following the teaching of *Zicherman*, conducted a choice of law analysis and concluded that United States law applied and that DOHSA supplies the applicable substantive United States damage law. *Id.* at 12-14

[5] Petitioners also argued that nonpecuniary damages for survivor's grief were recoverable under Korean law.

(JA 80-84). Next, the district court concluded that the rationale of *Zicherman* precludes the award of nonpecuniary damages for pre-death pain and suffering in a DOHSA case. *Id.* at 14 (JA 87-88). The district court held in this regard:

> [I]t appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles. . . . Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

Id. at 15 (JA 88) (footnote omitted).[6]

Petitioners appealed the decision of the district court, pursuant to 28 U.S.C. § 1292(b).

C. The Decision of the Court of Appeals Below

The Court of Appeals affirmed the decision of the district court. *In re Korean Air Lines Disaster of Sept. 1, 1983 ("Dooley")*, 117 F.3d 1477 (D.C. Cir. 1997) (JA 93). The Court of Appeals, following the decisions of the Court in *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), held that nonpecuniary damages for pre-death pain and suffering may not be recovered for a death on the high seas. *Dooley*, 117 F.3d at 1481-83 (JA 100-06). The Court of Appeals rejected Petitioners' reliance on several pre-*Zicherman* decisions allowing DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law. Rather, the Court of Appeals properly adopted the post-*Zicherman* conclusion of the Ninth Circuit

[6] The district court found Petitioners' argument that nonpecuniary damages for pre-death pain and suffering are recoverable under Korean law to be "irrelevant" because the court had determined that United States law governed the question of recoverable damages. *Id.* at 14 n.2 (JA 85).

in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996), and held that pre-death pain and suffering damages are not recoverable in an action governed by DOHSA. *Dooley*, 117 F.3d at 1481 (JA 100).

The Court of Appeals reasoned that, even if general maritime law provides a survival action in some cases, *Higginbotham* instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. *Dooley*, 117 F.3d at 1481 (JA 101). Thus, the Court of Appeals found that Congress decided in DOHSA, who may sue, that recovery is restricted to pecuniary losses and that "[j]udge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it." *Id.* (JA 101).

The Court of Appeals also found that it was fair to assume that Congress, in enacting DOHSA, understood the difference between wrongful death and survival actions and noted that the inclusion of a survival remedy in the Jones Act, 46 U.S.C. app. § 688 (enacted two months after DOHSA), but not in DOHSA, "scarcely seems inadvertent." *Id.* at 1481 (JA 102). The Court of Appeals determined § 765 of DOHSA to be a limited survival provision and held that the fact that DOHSA "contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted." *Id.* at 1482 (JA 102).

The Court of Appeals concluded that, to allow a decedent's estate to recover compensation for the decedent's pre-death injuries, necessarily would expand the class of beneficiaries recognized by Congress in DOHSA and allow for the recovery of nonpecuniary damages precluded by DOHSA. *Id.* (JA 103). In this regard, the Court of Appeals properly rejected Petitioners' argument based on the distinction between wrongful death and survival action remedies:

> They [Petitioners] have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Id. at 1482-83 (JA 104-05).

Finally, the Court of Appeals rejected Petitioners' reliance on the law of South Korea as a basis for the recovery of pre-death pain and suffering damages. *Id.* at 1483-85 (JA 106-110). Petitioners do not dispute this ruling of the Court of Appeals.[7]

SUMMARY OF ARGUMENT

"This case involves death on the high seas. The question is whether, in addition to the damages authorized by federal statute, a decedent's survivors may also recover damages under general maritime law." *Higginbotham*, 436 U.S. at 618. The answer of the *Higginbotham* Court to this question was "no". The answer of district court and Court of Appeals below in these cases to this question also was "no". Petitioners now argue that the answer to this question should be "yes".

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[7] Similarly, in the Court of Appeals, Petitioners did not challenge the district court's choice of law analysis and conclusion that the applicable damage law, pursuant to the Warsaw Convention, was the law of the United States. *Id.* at 1484 (JA 107).

Petitioners reject the relevancy of *Higginbotham* and *Zicherman*, arguing that those cases are limited to "wrongful death" actions and do not restrict the Court's ability to create a general maritime law "survival action" for pre-death pain and suffering damages. Petitioners are wrong.

Applying the holding and rationale of the Court in *Zicherman* and *Higginbotham* the district court and the Court of Appeals below rejected Petitioners' arguments and concluded that, because DOHSA allows the recovery of pecuniary damages only, nonpecuniary damages for pre-death pain and suffering are not recoverable in a DOHSA case. The Court of Appeals found that DOHSA is exclusive and cannot be supplemented by general maritime law or otherwise.

In DOHSA, Congress expressly and plainly stated that an action for a death on the high seas must be maintained for the "exclusive benefit" of the designated beneficiaries, restricted recoverable damages to the "pecuniary loss sustained" by the designated beneficiaries and made clear that if the decedent dies during the pendency of a personal injury action, that action is subsumed in the exclusive DOHSA action. 49 U.S.C. app. §§ 761, 762, 765 (RA 1-2). Damages for the pre-death pain and suffering of a decedent are not a "pecuniary loss sustained" by the DOHSA beneficiaries and, therefore, are not recoverable in an action to which DOHSA applies.

Petitioners' argument that the Court may create a general maritime law survival action for nonpecuniary pre-death pain and suffering damages ignores the exclusive nature of DOHSA. When DOHSA was enacted in 1920 there was no general maritime law death action available for a death on the high seas. Therefore, in enacting DOHSA, Congress created an action that did not previously exist and an action that Congress determined was to be exclusive. Congress plainly limited recovery for all deaths occurring on the high seas to pecuniary losses and to the designated beneficiaries. Petitioners now seek to circumvent DOHSA by arguing a "gap"

exists that may be filled by judge-made general maritime law. There is no gap to be filled.

Certainly, when DOHSA was enacted, Congress knew the difference between wrongful death and survival actions. Nevertheless, in DOHSA, Congress did not provide for the recovery of a decedent's personal injuries other than to allow a pending personal injury action to continue after death under DOHSA. When Congress knows how to say something, but does not do so, its silence is controlling. As the Court of Appeals stated: "When Congress decides to go only so far it necessarily has decided to go no further." *Dooley*, 117 F.3d at 1482 (JA 102). To allow DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering would be rewriting the rules Congress plainly and expressly has set forth in DOHSA. The Court consistently has rejected all judicial attempts to supplement DOHSA and has adhered to the principle that:

> Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

Dooley, 117 F.3d at 1481 (JA 101); *see Zicherman*, 516 U.S. at 231; *Higginbotham*, 436 U.S. at 625.

The Court of Appeals below adhered to the language of DOHSA and the directions of the Court in *Zicherman* and *Higginbotham* and concluded that nonpecuniary damages for the pre-death pain and suffering are not recoverable. The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NONPECUNIARY DAMAGES FOR PRE-DEATH PAIN AND SUFFERING ARE NOT RECOVERABLE IN AN ACTION GOVERNED BY DOHSA

Petitioners concede that, standing alone, DOHSA does not allow for the recovery of nonpecuniary pre-death pain and suffering damages. Petitioners' Brief at 19, 23, 35. Petitioners argue, nevertheless, that DOHSA is a wrongful death statute and not a survival statute and, therefore, Congress left the door open to judicial supplementation of the DOHSA prescribed pecuniary damages with nonpecuniary damages pursuant to general maritime law. Petitioners' Brief at 9-19, 23-29, 34-38. To achieve this supplementation, Petitioners argue that the Court should recognize a general maritime law survival action extending to the high seas so that a vast array of damages can be allowed, including pre-death pain and suffering, disfigurement, lost earnings and medical expenses. Petitioners' Brief at 12, 22.[8]

The Court of Appeals was correct in rejecting Petitioners' argument and in concluding that DOHSA provides the exclusive measure of damages for a death on the high seas, within the meaning of DOHSA, and that the pecuniary loss standard of DOHSA cannot be supplemented with any nonpecuniary damages under general maritime law.

[8] Petitioners' argument that the Court should also allow the recovery of damages for disfigurement, lost earnings and medical expenses, under a proposed general maritime law survival action, is improperly presented. Petitioners' Brief at 12, 22. This argument was neither presented nor ruled upon by the Court of Appeals or the district court below and cannot be fairly considered as being within the scope of the question presented in the Petition granted by the Court. *See* Sup. Ct. R. 24.1(a).

A. The DOHSA Damage Standard Is Exclusive and May Not Be Supplemented by General Maritime Law

While the Court in *Zicherman* stated that it need not consider the question whether the pecuniary loss limitation of DOHSA contradicts the allowance of pain and suffering damages, because the issue was not before the Court in *Zicherman*, it is clear that the awarding of such damages *does* contradict DOHSA. *Zicherman*, 516 U.S. at 230 n.4.

Under traditional general maritime law, as under the common law, there was no recognition of a cause of action for wrongful death or for the survival of personal injuries of a decedent.[9] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381-86 (1970); *see The Harrisburg*, 119 U.S. 199, 213-14 (1886) (holding judge-made general maritime law did not afford a cause of action for wrongful death). With respect to the non-survival of a decedent's personal injury action, the rule was based on the traditional common law rule that a personal cause of action in tort did not survive the death of its possessor. *Moragne*, 398 U.S. at 385.

In 1920, Congress, recognizing that no general maritime cause of action was available for a death on the high seas, enacted DOHSA to change the common law rule against recovery and to provide a federal cause of action for all deaths as a result of an accident occurring on the high seas. *See Offshore Logistics Corp. v. Tallentire*, 477 U.S. 207, 230 (1986); *Higginbotham*, 436 U.S. at 620.[10] In DOHSA,

[9] As the terms traditionally have been defined, a "wrongful death" action is intended to compensate designated beneficiaries for the losses they have sustained as a result of a decedent's death and a "survival" action continues any action the decedent may have had for personal injuries prior to death.

[10] But not in the territorial waters. As to supplementation by state statutes, "[t]he general understanding was that the statutes of the coastal States, which provided remedies for deaths within territorial waters, did not apply beyond state boundaries" and, in any event, such statutes are

Congress set forth a comprehensive scheme for all actions involving deaths occurring on the high seas: (1) § 761 establishes the cause of action and the beneficiaries; (2) § 762 restricts the recoverable damages to the "pecuniary loss" sustained by the designated beneficiaries; (3) § 763 sets forth a two year period of limitations;[11] (4) § 765 allows for the survival of a personal action filed by the victim prior to death to continue as an action under DOHSA if the victim dies during the pendency of the action; and (5) § 766 provides that contributory negligence of the decedent will not bar a recovery.[12] 46 U.S.C. app. §§ 761-66 (RA 1-3).

Notwithstanding the comprehensive nature of the DOHSA action, Petitioners argue that Congress left a gap in DOHSA that can be supplemented with nonpecuniary damages under general maritime law.

As the Court of Appeals and district court below correctly concluded, *Zicherman* and prior decisions of the Court establish that DOHSA has prescribed a comprehensive tort recovery regime and, where Congress has thus spoken, there can be no recovery other than as recognized and allowed by the Act of Congress. *Dooley*, 117 F.3d at 1481 (JA 101); *In re KAL-DDC II*, 935 F. Supp. at 15 (JA 88); *see Zicherman*, 516 U.S. at 229-31; *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215 (1996); *Miles*, 498 U.S. at 31-33; *Tallentire*, 477 U.S. at 207; *Higginbotham*, 436 U.S. at 624-25. For this reason, the Court has held consistently that where DOHSA applies, neither state law nor general maritime law can pro-

preempted by DOHSA. *Moragne*, 398 U.S. at 393 n.10; *see Tallentire*, 477 U.S. at 230-33.

[11] Section 763 was repealed in 1980 with the enactment of the Uniform Statute of Limitation for Maritime Torts which was codified at 46 U.S.C. app. § 763a. *See* discussion *infra* at 29-32.

[12] In addition, § 764 preserves rights under applicable foreign law and § 767 allows for concurrent jurisdiction in state courts and the preservation of state law to the territorial waters.

vide the basis for awarding what DOHSA does not allow—nonpecuniary damages. *Id.*[13]

In *Higginbotham*, the Court held that a general maritime law death action could not apply to a death on the high seas and expressly rejected the notion that there could be any supplementation of the DOHSA pecuniary damage restriction by nonpecuniary loss of society damages under such an action. The Court explained that where DOHSA addresses an issue, such as damages and beneficiaries:

> courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
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> * * *
>
> *Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements.* . . . In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 625 (citations omitted and emphasis added). Thus, DOHSA precluded the application of a general maritime law death action to a death occurring on the high seas within the meaning of DOHSA.

In *Tallentire*, the Court rejected the extension of a state wrongful death statute to the high seas and held that DOHSA may not be supplemented with nonpecuniary loss of society damages under a state wrongful death statute. 477 U.S. at 230-32. Thus, DOHSA precludes the application of a state

[13] Moreover, "[o]nce Congress has relied upon conditions that the courts have created" in enacting a statute (*i.e.*, no general maritime death action), courts "are not as free as [they] would otherwise be to change them." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 (1979) ("we should stay our hand in these circumstances . . . .").

death statute to a death occurring on the high seas within the meaning of DOHSA.

In *Miles*, the Court again reaffirmed the supremacy of maritime Acts of Congress. 498 U.S. at 32. While the Court in *Miles* held that a seaman's survivors could pursue a general maritime law wrongful death action, alleging unseaworthiness, in addition to a Jones Act[14] negligence claim, the Court restricted the extent to which the general maritime law may be relied upon to expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S. at 30-33. In addition, the Court declined to allow the recovery of the decedent's lost future earnings under a general maritime law survival action, finding that such a recovery would be inconsistent with the remedies allowed by the Jones Act and maritime law. *Id.* at 35-36.

Finally, in *Zicherman*, the Court "made it crystal clear that where DOHSA governs, it governs exclusively."[15] The Court in *Zicherman*, rejecting the view that general maritime law governs recoverable damages for a death on the high seas, stressed that the Warsaw Convention cannot serve to "empower [the courts] to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition." *Zicherman*, 516 U.S. at 229. The Court stated that where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages and the application of the Warsaw Convention cannot change this result. *Id.* at 230.

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[14] 46 U.S.C. app. § 688 (RA 4).

[15] *Bickel v. Korean Air Lines*, 96 F.3d 151, 158 (6th Cir. 1996) (Batchelder, J., dissenting), *amending on reh'g*, 83 F.3d 127 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

If the Court now were to supplement DOHSA with nonpecuniary remedies, based on a general maritime law survival action, the Court would be "rewriting rules that Congress has affirmatively and specifically enacted," the Court would have to create an entirely "different class of beneficiaries" not mentioned in DOHSA (the estate of the decedent), and the Court would have to create a "different measure of damages" which Congress chose not to provide in DOHSA (nonpecuniary pre-death pain and suffering damages). *Higginbotham*, 436 U.S. at 625. This is precisely the result that the Court repeatedly has held cannot be achieved by a court, whether under cover of general maritime law or some other body of law. *Zicherman*, 516 U.S. at 229-30; *Miles*, 498 U.S. at 27-33; *Tallentire*, 477 U.S. at 209; *Higginbotham*, 436 U.S. at 624-25; *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 599-601 (1974) (Powell, J., dissenting). As the Court in *Calhoun* recently reaffirmed:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied [DOHSA and the Jones Act], there is, we have generally recognized, no cause for enlargement of the damages statutorily provided.

Calhoun, 516 U.S. at 215 (citing *Miles*, 498 U.S. at 30-36; *Tallentire*, 477 U.S. at 232; *Higginbotham*, 436 U.S. at 624-25). Thus, a court must give effect "to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' ". *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

B. Pre-Death Pain and Suffering Damages Are Not Consistent With the Language and Intent of DOHSA

Petitioners argue that the fact that Congress did not include a survival provision in DOHSA, allowing for the recovery of nonpecuniary pre-death pain and suffering damages, does not

prevent the Court from now creating such an action. In support of this position, Petitioners argue that (1) the language of DOHSA does not preclude the recognition of a survival action, (2) Congress did not intend to "eliminate" survival actions in enacting DOHSA and (3) this intent is confirmed by the enactment in 1980 of 46 U.S.C. app. § 763a. Petitioners' Brief at 15-39. Petitioners are wrong.

1. Pre-Death Pain and Suffering Damages Conflict With the Class of Beneficiaries and Damages Established by DOHSA

Petitioners argue that a general maritime law survival action, allowing for the recovery of nonpecuniary pre-death pain and suffering damages, does not conflict with DOHSA because such nonpecuniary damages will be recovered by the estate of the decedent in a separate action. Petitioners' Brief at 17, 33. The plain language of DOHSA forecloses the argument.

Section 761 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the *exclusive benefit* of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. app. § 761 (emphasis added) (RA 1).

Section 761 grants an exclusive right of action to the personal representative to sue for the death of the decedent for the "exclusive" benefit of the named beneficiaries. The Congressional aim of DOHSA was to create a uniform and exclusive remedy "[w]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. app. § 761 (RA 1); *see* 59 Cong. Rec. 4482-83 (Mar. 17, 1920). DOHSA, "so far as the high seas are concerned, makes the remedy exclusive." S. Rep. No. 66-216, at 3 (1919).

The general maritime law survival action proposed by Petitioners is independent from DOHSA and outside the scope of § 761. The action proposed by Petitioners would necessarily expand the class of beneficiaries recognized in DOHSA, which does not include a decedent's estate, and also would allow for the recovery of damages prohibited by DOHSA. As a result, DOHSA no longer would be the exclusive action for a death on the high seas "for the *exclusive* benefit" of the designated beneficiaries. As the Court of Appeals correctly concluded:

> Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625, 98 S.Ct. at 2015. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C.App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

117 F.3d at 1482 (JA 103) (emphasis in original).

Petitioners' proposed survival action also would allow the "estate" to recover nonpecuniary damages (not allowed by DOHSA) which would be distributed through the estate to the

designated beneficiaries according to applicable state intestacy statutes. Petitioners' Brief at 23. This recovery and distribution scheme would conflict with § 762 of DOHSA, which expressly provides that any recovery for a death on the high seas "shall be apportioned" by the Court. 46 U.S.C. app. § 762 (RA 1).

Moreover, Petitioners' proposed survival action also conflicts with the distribution schemes recognized in maritime law survival statutes. If the Court were to recognize a general maritime law survival action, as urged by Petitioners, the Court presumably would be guided by other federal statutes, which contain express provisions for a survival action. *See Miles*, 498 U.S. at 27; *Higginbotham*, 436 U.S. at 624. Pursuant to the survival provisions of the Jones Act, 46 U.S.C. app. § 688 (RA 4) and Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 59 (RA 7),[16] a decedent's personal representative may sue for damages suffered by the decedent, but only for the benefit of a fixed class of surviving relatives. The judicial adoption of such a survival provision in an action governed by DOHSA would be in direct conflict with the specific provisions of DOHSA. The Court of Appeals below explained that, while such an approach would leave DOHSA's designated beneficiary class intact,

> it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C.app. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others—their decedents. That result *Higginbotham* forecloses.

117 F.3d at 1482 (JA 104).

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[16] *See also* Longshoremen's Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 908(d), which provides a similar scheme for payment of benefits upon the death of a longshoreman.

In this regard, the most direct conflict that would be created by Petitioners' proposed survival action relates to recoverable damages. A general maritime law survival action for nonpecuniary pre-death pain and suffering damages conflicts with the "pecuniary losses" restriction of § 762 of DOHSA. Petitioners simply dismiss this inherent contradiction by insisting that DOHSA is a wrongful death statute which has no bearing on damages recoverable under a survival action. Both the Court of Appeals below and the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996), properly rejected this argument. The Court below explained:

> [Petitioners] have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

117 F.3d at 1482-83 (JA 104-05).

The Ninth Circuit in *Saavedra* finding that it could not perceive of any distinction, which the *Zicherman* Court would have approved, that would prohibit the recovery of one type of nonpecuniary damages under DOHSA (*e.g.*, loss of society), but allow the recovery of another type of nonpecuniary damages in a DOHSA case (*e.g.*, pre-death pain and suffering), concluded:

> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

93 F.3d at 554.

Pre-death pain and suffering damages, because they are not pecuniary damages, are not recoverable.

In light of *Zicherman* and other precedents of the Court, the district court below concluded that "DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles" and dismissed the claims for nonpecuniary pre-death pain and suffering damages. *In re KAL-DDC II*, 935 F. Supp. at 15 (JA 87-88). The Court of Appeals affirmed. *Dooley*, 117 F.3d at 1481-83 (JA 100-06). In both instances the courts below were correct and the judgment of the Court of Appeals should be affirmed.

2. Recognition of a Survival Action Where DOHSA Is Applicable Would Be Inconsistent With § 765 of DOHSA

That Congress intended, in DOHSA, to limit recovery in all cases of fatalities on the high seas, whether instantaneous or not, to the pecuniary loss sustained by the designated beneficiaries, is evidenced further by § 765 of DOHSA. 46 U.S.C. app. § 765 (RA 2).

Section 765 of DOHSA permits a personal representative to be substituted for an injured plaintiff, who dies during the pendency of a personal injury suit, but the suit may only then continue under DOHSA and only to recover the pecuniary loss damages permitted by DOHSA for the beneficiaries designated by DOHSA. *See In re Air Disaster Near Honolulu,*

Hawaii on Feb. 24, 1989, 792 F. Supp. 1541, 1546 n.8 (N.D. Cal. 1990) ("*Hawaii I*"). By enacting § 765, Congress changed the common law rule of non-survival of a personal injury action, but only to the extent specifically provided in DOHSA. As recognized by the Court in *Higginbotham*:

> [B]ecause Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, *survival*, and damages.

436 U.S. at 625 (emphasis added).[17]

While § 765 was not discussed during the DOHSA congressional debates in 1920, Robert Hughes, who claims to have drafted DOHSA, discussed this provision, as contained in an earlier version of DOHSA, during a House hearing in 1916. Mr. Hughes explained the impact of § 765 (then § 4) as follows:

> Here is another provision: The old limitation ran from the death of the decedent. Our draft is from the date of the wrongful act. Lord Campbell's act, you will remember, made it from the death of the decedent, but at that time there was no such thing as survival of action for personal injuries where the death did not occur within a

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[17] Section 765 is similar to some state wrongful death statutes. *See* 3 Stuart M. Speiser *et al.*, *Recovery for Wrongful Death and Injury* § 14:4, at 11 n.37 (3d ed. 1992) (discussing Virginia and West Virginia statutes); *see also El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 490-91 (4th Cir. 1986); *Bogen v. Green*, 239 A.2d 154 (D.C. 1968) (D.C. statute). Although the West Virginia and D.C. statutes were amended in 1989 and 1978, respectively, to allow recovery for pain and suffering, the fact remains that the legislature, *not* the courts, made the decision and the change in the law. *See id.*; *Estate of Helmick v. Martin*, 425 S.E.2d 235 (W. Va. 1992).

year, and consequently Lord Campbell's act had to make it from the date of the death. But now, under section 4, if a man is injured he can bring his suit, and if he dies pending the suit, he can revive it; so that difficulty under the law has been obviated, and consequently the statutes ought to run from the wrongful act and not from the death. The wrongful act is a matter in the knowledge of both parties. The death may be a matter only in the knowledge of one side, and expert testimony might show a man died in consequence of a collision 10 years after it happened. So that the difficulty Lord Campbell had to meet does not enter under the circumstances in view of section 4, which gives a right to sue for the damages before they result in death, and then to revive that, instead of having it abate, as it used to do at common law.

Right of Action for Death on the High Seas: Hearings Before the Subcomm. II, Procedure, Jurisdiction, Etc. of the Committee on the Judiciary, 64th Cong., at 15 (1916) (statement of Hon. Robert M. Hughes).

Petitioners reject the relevancy of § 765 and argue it is merely a "permissive means of ensuring the survival of the wrongful death remedy when death occurs after DOHSA's limitations had expired" and does not require the personal representative to abandon any survival action available under "applicable statutes or general maritime law." Petitioners' Brief at 32. The Congressional purpose for and significance of § 765 cannot so easily be dismissed.

Petitioners are incorrect in viewing § 765 as "permissive" and disregard that the word "may" is not used to designate a permissible course of action, but rather to revive a right of action that otherwise would have abated. *See, e.g., Wilson v. Transocean Airlines*, 121 F. Supp. 85, 94 (N.D. Cal. 1954) (interpreting "may" as used in § 761); *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909, 910 (S.D.N.Y. 1941) (interpreting "may" as used in § 764). As a result, if the personal representative did not "elect" to proceed under DOHSA, the previously commenced personal injury action would abate.

Moreover, Petitioners fail to identify any survival action that was available under "applicable statutes or general maritime law" in 1920, for a death on the high seas, which Congress could have possibly intended to preserve by adopting § 765 in DOHSA. Petitioners' Brief at 32. At the time DOHSA was enacted there was no general maritime law survival action and, therefore, a pending personal injury action, absent a statute, would have abated on the death of the decedent.[18] Thus, it is difficult to understand Petitioners' reference to a "survival action that was available under applicable statutes or general maritime law"—there were none in existence applicable to a death on the high seas. To accept Petitioners' argument would render § 765 nonsensical. A personal injury action cannot both continue under DOHSA as required by § 765 and at the same time continue independently outside the scope of DOHSA under a non-existent law. *See Oceanic Contractors, Inc.*, 458 U.S. at 575 ("interpretations of statutes which produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available").

Petitioners also find significant that § 765 refers to the damages and beneficiaries in § 761 and § 762 and does not allow for the recovery of the decedent's personal injuries. Petitioners' Brief at 33. It is significant, in that the effect of § 765 is affirmatively to extinguish the decedent's personal injury claim. Thus, § 765 reaffirms the exclusive nature of the DOHSA remedy and that the only "survival" of the personal injury action contemplated by Congress was to allow for the

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[18] While Petitioners do not refer to state survival statutes, at the time DOHSA was enacted, Congress considered that such statutes did not extend to the high seas and would be preempted by the exclusive nature of DOHSA. *See supra* note 10.

substitution of the party plaintiff after death and only to pursue the pecuniary damages permitted by DOHSA and for the benefit of the beneficiaries designated in DOHSA. *Hawaii I*, 792 F. Supp. at 1545-46. As the Court of Appeals below explained:

> That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. *When Congress decides to go only so far it necessarily has decided to go no further.*

117 F.3d at 1482 (JA 102) (emphasis added).

To allow supplementation of DOHSA with nonpecuniary damages under general maritime law would effectively render § 761, § 762 and § 765 of DOHSA meaningless. *See Higginbotham*, 436 U.S. at 625 ("courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless"); *see also Tallentire*, 477 U.S. at 222 ("Normal principles of statutory construction require that [a court] give effect to the subtleties of language that Congress chose to employ . . . .").

The judgment of the Court of Appeals dismissing the claims for nonpecuniary pre-death pain and suffering damages should be affirmed.

3. Congress Left No Gap in DOHSA To Be Filled by General Maritime Law

Petitioners claim that neither the language of DOHSA nor its history suggests that Congress intended to "eliminate" survival actions. Petitioners' Brief at 24-29. Petitioners argue that, because DOHSA does not contain an express statement precluding a survival action for pre-death pain and suffering damages, the Court may now create one. Petitioners' Brief at 25. Relying on statutory interpretation principles, Petitioners

argue that, absent an explicit statement in a statute or an implicit presumption based on the structure and language of a statute, state law or common law remedies are not preempted by the enactment of a federal statute. Petitioners' Brief at 25.

Petitioners' argument again ignores the historical fact that when Congress enacted DOHSA in 1920, there was no general maritime law death action, whether for wrongful death or survival damages. Thus, in enacting DOHSA, Congress was creating a right that *did not* exist under the general maritime law. It was not necessary (and indeed would have been strange) for Congress to set forth in DOHSA a provision expressly stating that, in enacting DOHSA, it was preempting a cause of action that did not exist for a death on the high seas.

Moreover, it cannot accurately be said, that Congress was "silent" as to the availability of a survival action for pre-death pain and suffering. As fully discussed *supra* at 11-24, the structure and language of DOHSA evidences the congressional intent as to its exclusive nature and that supplementation of DOHSA is not possible. *Tallentire*, 477 U.S. at 227-32; *Higginbotham*, 436 U.S. at 623-25; *Moragne*, 398 U.S. at 397. Congress did not regard, let alone assume, that DOHSA could be supplemented under any law.

The more appropriate canon of statutory construction in relation to DOHSA in these cases is that:

> when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (quoting *Botany Mills v. United States*, 278 U.S. 282, 289 (1929)); *see Middlesex Cty.*

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981); *see Dooley*, 117 F.3d at 1482 ("When Congress decides to go only so far it necessarily has decided to go no further.") (JA 102). Petitioners' argument turns this canon on its head.

Even if DOHSA is viewed as a strict wrongful death statute and as "silent" on the issue of survival, the presumption is that Congress, in enacting DOHSA, intended to *exclude* a survival action and all nonpecuniary damages.[19] Thus, "[i]n the absence of strong indicia of a contrary congressional intent, [courts] are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex Cty. Sewerage Auth.* 453 U.S. at 15.

There is no indication that Congress intended to leave a gap in DOHSA which could be filled by some unknown source of law. The absence of a general survival action in DOHSA cannot be considered a mere congressional oversight which allows for judicial supplementation of the DOHSA remedy.[20] The drafters of DOHSA clearly understood the distinction between wrongful death and survival remedies and expressly

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19 Indeed, the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme such as DOHSA. *See Calhoun*, 516 U.S. at 215; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981). DOHSA sets forth all the essential elements for a cause of action.

20 Any argument that DOHSA was not carefully drafted is belied by the legislative history of DOHSA. DOHSA was first considered as early as 1909 and discussed in every session until its passage. *See* F. Cunningham, *Shall We Continue To Be Drowned at Sea Without Remedy?*, 22 Case & Com. 129 (1915); R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115 (1921); H. Putnam, *The Remedy for Death at Sea*, 22 Case & Com. 125 (1915); G. Whitelock, *Damages for Death By Negligence at Seas—The Titanic*, 49 Am. L. Rev. 75 (1911); G. Whitelock, *A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 Harv. L. Rev. 401 (1909) (outlining history of DOHSA); *see also* 59 Cong. Rec. 4484 (Mar. 17, 1920); 52 Cong. Rec. 1065-76 (Jan. 6, 1915); H.R. Rep. No. 63-160 (1913).

limited recoverable damages in DOHSA to the pecuniary losses sustained by the designated beneficiaries. *See* R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 119-20 (1921). This is clear from the reports of the Senate and House Judiciary Committees leading to the enactment of DOHSA:

> . . . *State statutes . . . are far from uniform. In some States the recovery is limited to the conscious suffering before death—a matter difficult of proof in case of drowning at sea.* Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. In a few States the remedy for damages must follow or be concurrent with a criminal prosecution, so that the offender must have been first indicted.
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> * * *
>
> Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone can enact.
>
> The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty, both in rem and in personam. *The right is made exclusive for deaths on the high seas*, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.

S. Rep. No. 66-216, at 3 (1919) (statement of Hon. H. Putnam) (emphases added and citation omitted).

Shortly after the enactment of DOHSA, the same Congress enacted the Jones Act, which specifically provides for a survival remedy, in addition to a wrongful death action for seamen, through the incorporation of the provisions of the

FELA.[21] *Miles*, 498 U.S. at 35; *Hawaii I*, 792 F. Supp. at 1546 n.8. No such survival provision was included in DOHSA. *Id.* Had the same Congress intended to provide for a general survival action and appropriate remedies under DOHSA, as it did in the Jones Act, clearly it would have done so. As the Court of Appeals below correctly noted:

> A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

117 F.3d at 1481-82 (JA 102).

Petitioners dismiss the significance of the Jones Act survival provision, stating that the Jones Act was hastily enacted and "just one section of a comprehensive legislation dealing with maritime matters." Petitioners' Brief at 33. The implication, therefore, is that Congress did not carefully consider the effect of the incorporation of FELA into the Jones Act. Petitioners' Brief at 34. If Petitioners are correct, then the implication is that, because the Jones Act was enacted after DOHSA, which was carefully considered, the allowance of a survival provision in the Jones Act was unintended. Under Petitioners' argument, however, had Congress fully considered the issue, Congress would have patterned the Jones Act after DOHSA and would not have included a survival remedy in the Jones Act as it did.

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[21] 45 U.S.C. app. §§ 51 *et seq.* (RA 6-7). FELA was adopted on April 22, 1908. As originally drafted, FELA did "not provide for any survival of the right of action created in behalf of an injured employee," and FELA being paramount and exclusive, it "therefore extinguished" any such right given by state survival statutes. *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 67-68 (1913); *see St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 656 (1915). As a result, Congress amended FELA on April 5, 1910 to provide, in addition to a wrongful death action, a survival action. *Craft*, 237 U.S. at 660-61; S. Rep. No. 61-432, at 12-15 (1910); H.R. Rep. No. 61-513, at 3-6 (1910).

It must be accepted "that Congress is aware of existing law when it passes legislation." *Miles*, 498 U.S. at 32; *Tallentire*, 477 U.S. at 228; *Dooley*, 117 F.3d at 1481-82 (JA 102). Therefore, if Congress had intended to allow for the survival of a decedent's personal injury claim in a high seas death, it certainly would have done so in DOHSA, as it did in 1910 with FELA. The simple fact is that Congress did not do so and, as a result, the courts cannot now presume to do what Congress chose not to do. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979) (in addressing whether to recognize a private remedy, the Court stated: "Obviously . . . when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.").

4. The Enactment of § 763a Does Not Acknowledge Congress' Approval of Survival Actions Coexisting With DOHSA Actions

Petitioners argue that § 763a "acknowledges Congress' approval of survival actions coexisting with DOHSA death actions." Petitioners' Brief at 29. This argument is based on an erroneous interpretation of the clear language, purpose and intent of § 763a. 46 U.S.C. app. § 763a (RA 2).

Petitioners are simply wrong when they state that "§ 763a was enacted as part of DOHSA." Petitioners' Brief at 31. The Codification Note following § 763a expressly states that this "[s]ection was not enacted as part of act Mar. 30, 1920, known as the Death on the High Seas Act, which comprises this chapter." 46 U.S.C. app. § 763a note (1994) (Codification Note) (RA 2). Accordingly, while § 763a is a part of Title 46, it is not a part of DOHSA.

Petitioners are also incorrect in suggesting that Congress enacted § 763a in response to court decisions "recogniz[ing] a general maritime law survival cause of action akin to the *Moragne* general maritime death action." Petitioners' Brief

at 11. The legislative history leading to the enactment of § 763a demonstrates that the purpose of § 763a was simply "to establish a uniform national statute of limitations for maritime torts." H.R. Rep. No. 96-737, at 1 (1980); *see* 126 Cong. Rec. 2591 (1980) (statement of Rep. Murphy) ("The bill now under consideration [§ 763a] would establish a uniform statute of limitation of actions seeking compensation for injury or death resulting from a maritime tort."); *Usher v. M/V Ocean Wave*, 27 F.3d 370, 371 (9th Cir. 1994) ("In 1980, Congress adopted § 763a, providing a uniform three-year statute of limitations for maritime personal injury and wrongful death claims.").[22]

Prior to the enactment of § 763a in 1980, any of at least three different statutes of limitation could apply to plaintiffs' suits arising from personal injuries or death sustained on navigable waters. The statute of limitations for a cause of action pursuant to DOHSA was two years and for a cause of action pursuant to the Jones Act was three years. In addition, a cause of action under the general maritime concept of "unseaworthiness" was not governed by any specific statute of limitations, but was governed by the doctrine of laches, permitting courts to reach widely divergent interpretations and allowing litigants to choose those courts with the most favorable interpretation of timeliness. *See* H.R. Rep. No. 96-737, at 1-2 (1980); 126 Cong. Rec. 2592 (1980) (statement of Rep. Dornan); 126 Cong. Rec. 26,884 (1980) (statement of Sen. Cannon).

In enacting § 763a, Congress intended to establish a uniform period of limitations for all suits arising from maritime torts and to eliminate the uncertainty caused by reliance on the doctrine of laches. *See* H.R. Rep. No. 96-737, at 1-2

[22] The bill (H.R. 3748) was entitled the "Uniform Statute of Limitations for Marine Torts." *See* H.R. Rep. No. 96-737, at 1 (1980); 126 Cong. Rec. 2591 (1980); *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 63 (2d Cir. 1996).

(1980) ("These divergent interpretations of timeliness for bringing an unseaworthiness claim have resulted in many litigants choosing the most favorable forum in which to bring suit."); 126 Cong. Rec. 2592 (1980) (statement of Rep. Dornan) (§ 763a "would eliminate this inconsistency by establishing a 3-year statute of limitations that would apply to both claims brought under the 'unseaworthiness' doctrine and to claims brought under the Death on the High Seas Act."). The legislative history of § 763a contains no reference that supports Petitioners' erroneous assumption that in enacting § 763a Congress somehow approved of survival actions coexisting with DOHSA death actions. Petitioners' Brief at 11, 30-31.

Significantly, Petitioners ignore that Congress did not merely amend § 763, but repealed § 763 and enacted § 763a, not as a replacement of § 763, but as a *new* section to all shipping laws (Title 46). *See* 46 U.S.C. app. § 763a (Codification Note) (RA 1-2).

Based on the actual purpose of § 763a, as historically detailed above, Petitioners' entire argument that "[i]t is difficult to identify a purpose for the 'or both' language other than a recognition that both survival and death actions may be maintained simultaneously," is simply wrong. Petitioners' Brief at 30-31. Because Congress intended § 763a to eliminate the inconsistency in maritime law, by establishing a three-year statute of limitations for *all* maritime tort claims, § 763a governs any suit for personal injuries **or** wrongful death arising from a maritime tort, and any suit for personal injuries **and** wrongful death arising from a maritime tort. *See Bennett*, 64 F.3d at 63; *Ford v. Atkinson Dredging Co.*, 474 S.E.2d 652 (Ga. Ct. App. 1996).

Section 763a cannot correctly be construed to recognize concurrent actions for personal injuries and wrongful death pursuant to DOHSA. Petitioners' argument to the contrary lacks any merit.

II

THERE IS NO GENERAL MARITIME LAW SURVIVAL ACTION THAT EXTENDS TO THE HIGH SEAS

In light of the exclusive nature of DOHSA, there can only be one answer to the question of whether the Court should create, as urged by Petitioners, a general maritime law survival cause of action for pre-death pain and suffering for a death occurring on the high seas—No.

The decisions of the Court make clear that general maritime law, as federal common law, is merely a necessary expedient "resorted to '[i]n absence of an applicable Act of Congress' " when federal courts are forced to resolve issues which cannot be answered by or with reference to federal statutes alone. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)); *see Miles*, 498 U.S. at 27-31, 38; *Higginbotham*, 436 U.S. at 623-25. In this case, there is no need to resort to general maritime law, let alone create an entirely new cause of action, as there is an applicable federal statute, DOHSA, that has already resolved the issue.

DOHSA does not allow recovery for pre-death pain and suffering and the Court has never recognized the existence of a general maritime law survival action applicable to a death on the high seas. *See Calhoun*, 516 U.S. at 210 n.7; *Miles*, 498 U.S. at 33-35; *Tallentire*, 477 U.S. at 215 n.1; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 370-71 (1932); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157 (1964).

Nevertheless, Petitioners argue that Moragne somehow can support the recognition of a general maritime law survival action, as a supplement to the DOHSA remedy. Petitioners' Brief at 19-22. This argument flies in the face of DOHSA,

ignores the rationale of *Moragne* and would extend *Moragne* to create a general maritime law *survival action* for a death on the *high seas*.

A. *Moragne* Cannot Serve as the Basis for Supplementing the Exclusive DOHSA Recovery

Moragne involved an action for the death of a longshoreman killed in Florida territorial waters. 398 U.S. at 376. An action was brought under the Florida state wrongful death and survival statutes alleging both negligence and unseaworthiness. The district court dismissed the wrongful death unseaworthiness claim on the basis of *The Tungus v. Skovgaard*, 358 U.S. 588 (1959),[23] which held that when state statutes are applied to fatalities in the territorial waters, the state statute provides the standard of liability as well as the remedial scheme. The Court of Appeals affirmed the dismissal of the unseaworthiness claim, following the decision of the Florida Supreme Court holding that the Florida wrongful death statute did not encompass unseaworthiness as a basis for liability.

The Court in *Moragne* reversed the decision. The Court first noted that the source of the problem did not lie with *The Tungus*, but with *The Harrisburg*. 398 U.S. at 378. After reexamining the soundness and historical basis for the rule announced in *The Harrisburg*, the Court overruled *The Harrisburg* and recognized a general maritime law *wrongful death* cause of action based on unseaworthiness for a death occur-

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[23] In *The Tungus*, the Court addressed the consequences that flow from the rule in *The Harrisburg* that in the absence of a statute there is no action for wrongful death. In such a situation, the Court found that where the death on state territorial waters is left remediless by general maritime law and by federal statute, a remedy may be provided under any applicable state death statute. The Court, however, divided on the further holding that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." *The Tungus*, 398 U.S. at 592.

ring in state *territorial* waters. *Id.* at 409. Central to *Moragne* was the unavailability of the doctrine of unseaworthiness as the basis for liability under the state wrongful death statute. Also important was the finding by the Court that there was no affirmative Congressional intent or public policy[24] that precluded recognition of a general maritime law action for wrongful death occurring in the territorial waters. The Court recognized the "wholesale abandonment" of the rule against wrongful death actions:

> In the United States, every State today has enacted a wrongful-death statute. The Congress has created actions for wrongful deaths of railroad employees, Federal Employers' Liability Act, 45 USC §§ 51-59; of merchant seamen, Jones Act, 46 USC § 688; and of persons on the high seas, Death on the High Seas Act, 46 USC §§ 761, 762.

398 U.S. at 390 (citation omitted).

The Court specially noted that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Id.* at 402. Thus, while *Moragne* recognized a general maritime wrongful death action for territorial waters, the Court was cognizant of the role and preeminence of federal legislation, such as DOHSA.

In the period between *Moragne*'s recognition of a general maritime law wrongful death action for a death in the territorial waters and *Higginbotham*, the lower federal courts had extended *Moragne* to the high seas to allow recovery of nonpecuniary wrongful death damages and to create a survival action not recognized by DOHSA. These courts viewed that the common law *Moragne* action had completely supplanted the statutory DOHSA action. *See Higginbotham*, 436 U.S. at

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[24] *Moragne*, 398 U.S. at 390 (citing DOHSA, the Jones Act, FELA and the Federal Tort Claims Act, 28 U.S.C. § 2674).

623 n.16; *Law v. Sea Drilling Corp.*, 523 F.2d 793, 798 (5th Cir. 1975).

Against this historical backdrop, the Supreme Court in *Higginbotham* addressed the question: "whether, in addition to the damages authorized by federal statute [DOHSA], a decedent's survivors may also recover damages under general maritime law." 436 U.S. at 618. The Court's answer was an unequivocal "No". The Court explained:

> Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses.
>
> * * *
>
> In *Moragne*, the Court recognized a wrongful-death remedy that supplements federal statutory remedies. But that holding depended on our conclusion that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies. Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. . . . In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 623, 625 (citations omitted); *see Miles*, 498 U.S. at 32 (courts are not to "sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed").

Nevertheless, Petitioners now argue that DOHSA leaves a "gap" that may be filled by a general maritime law survival action based on *Moragne* and claim to find support for such an extension in *Higginbotham*. Petitioners' Brief at 20-22, 34-37.

Petitioners rely upon the Court's statement in *Higginbotham* that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Petitioners' Brief at 35 (citing 436 U.S. at 625). Petitioners misunderstand the statement of the Court. The statement is not an invitation to supplement DOHSA with nonpecuniary damages under general maritime law. The Court simply was stating that it was appropriate for the Court in *Moragne* to recognize a wrongful death action under general maritime law and for the Court, in *Gaudet*, to allow recovery of loss of society damages, because both *Moragne* and *Gaudet* involved deaths occurring in the territorial waters, where Congress has not legislated. *Higginbotham*, 436 U.S. at 625. This was not the case in *Higginbotham*, however, as the deaths there occurred on the high seas, where Congress has legislated in DOHSA.[25]

Similarly, Petitioners' argument that Gaudet implicitly approves recovery of survival damages under DOHSA is wrong. Petitioners' Brief at 38-39. The issue in *Gaudet*, a non-DOHSA action involving a longshoreman, was whether decedent's recovery prior to his death for his personal injuries precluded his widow from recovering wrongful death damages after his death. The Court held that she was not. Petitioners' conclusion that this result supports a general maritime law survival action is baseless. While *Gaudet* stated in footnote 10 that this result was consistent with DOHSA, the Court did not refer to any cases or provide an analysis. 414 U.S. at 584 n.10; *see Higginbotham*, 436 U.S. at 622 n.15 (noting that DOHSA offers no guidance on this issue). Moreover, footnote 10, even if accurate, does not support Petitioners' argument that DOHSA may be supplemented with a survival action. *See* 414 U.S. at 600-01 (Powell, J., dissenting). The Court of Appeals in *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982), addressed the "narrow question" that confronted the *Gaudet* Court, but in the context of DOHSA. While reaching a conclusion similar to *Gaudet*, the *Bodden* court recognized that "DOHSA does furnish an exclusive remedy for *injuries* occurring on the high seas." *Bodden*, 618 F.2d at 327 (emphasis added). Thus, *Bodden* confirms that DOHSA is "exclusive" and cannot be supplemented.

[25] Similarly, Petitioners misunderstand the Court's statement in *Higginbotham* that DOHSA does not address every issue of wrongful death. Petitioners' Brief at 35. The Court was simply noting that DOHSA offered no guidance to whether a death action can be maintained if the decedent recovers personal injury damages prior to death. *See Higginbotham*, 436 U.S. at 622 n.15.

Petitioners' argument in support of a general maritime law survival action for nonpecuniary pre-death pain and suffering damages disregards the exclusivity of DOHSA and the following essential factors, which led the Court in *Moragne* to recognize a general maritime law wrongful death action, which are not present in these cases: (1) the unavailability of unseaworthiness based liability; (2) the universal abandonment of the common-law rule and (3) the absence of federal legislation. *Moragne*, 398 U.S. at 388-403.

Unseaworthiness. The disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful death statutes "figured prominently" in the *Moragne* decision. *Calhoun*, 516 U.S. at 208; *Moragne*, 398 U.S. at 395-97. Unlike the situation confronted by the Court in *Moragne*, DOHSA recognizes unseaworthiness as a basis for liability. *See Miles*, 498 U.S. at 26.

Wholesale abandonment of the common law rule. Unlike the "wholesale abandonment" of the common law rule against wrongful death actions as evidenced by state and federal statutes, the same cannot be said with respect to survival actions for the recovery of pre-death pain and suffering damages. At the State level, at least eight States and the Virgin Islands today specifically prohibit the recovery of pre-death

pain and suffering damages.[26] At the federal level, "DOHSA does not include a survival provision authorizing recovery for pain and suffering before death." *Tallentire*, 477 U.S. at 215 n.1; *see Miles*, 498 U.S. at 35. Thus, it cannot be said that there is a unanimous "policy" permitting pre-death pain and suffering damages.

Absence of federal legislation. Finally, while in *Moragne* there was the absence of any applicable federal legislation, Congress has legislated for all deaths occurring on the high seas. Supplementation of DOHSA with nonpecuniary damages under general maritime law is not simply "gap" filling,

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[26] *See, e.g., Arizona*: Ariz. Rev. Stat. § 14-3110 (1997) (survival statute expressly provides that "damages for pain and suffering of such injured person shall not be allowed."); *California*: Cal. Civ. Proc. Code § 377.34 (West 1998) (recoverable damages in survival action "do not include damages for pain, suffering, or disfigurement"); *Colorado*—Colo. Rev. Stat. § 13-20-101(1) (1997) (survival statute expressly provides that recoverable damages "shall not include damages for pain, suffering, or disfigurement."); *Idaho*: *Vulk v. Haley*, 736 P.2d 1309, 1313 (Idaho 1987) ("[A]n action for pain and suffering does not survive the death of the injured."); *Virginia*: Va. Code Ann. § 8.01-25 (Michie 1997) (if death caused by injury, pleading must be amended and brought under wrongful death statute); *Seymour v. Richardson*, 75 S.E.2d 77, 81 (Va. 1953) (no recovery for pain and suffering of decedent in wrongful death action); *Virgin Islands*: V.I. Code Ann. tit. 15, § 601 and tit. 5, § 76(d) (1997) (survival statute is subject to wrongful death statute which provides that "[w]hen a personal injury to the decedent results in his death no action for the personal injury shall survive, and any such action pending at the time of death shall abate."); *Wyoming*: Wyo. Stat. § 1-4-101 (1997) (if injured person dies, then damages limited to those recoverable for wrongful death); *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971) (where decedent's death caused by injuries, pain and suffering damages are not recoverable). In addition, *Indiana* and *Minnesota* do not allow survival of actions for pre-death pain and suffering damages where the decedent has died from the actionable injuries. *See Indiana*: *American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1457-58 (7th Cir. 1996); *Minnesota*: Minn. Stat. Ann. § 573.02 (West 1997).

as argued by Petitioners. It amounts to a circumvention of the pecuniary loss proscriptions of DOHSA.

The Court in *Miles*, *Calhoun* and *Zicherman* reaffirmed *Higginbotham*'s interpretation of *Moragne*. The Court in *Miles* explained that because "*Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate." *Miles*, 498 U.S. at 31. However, in an "area covered by the statute," supplementation is improper. *Id.* (quoting *Higginbotham*, 436 U.S. at 625). Thus, it is *not* "only a small leap from the decision in *Moragne* to an acceptance of the survival of personal injury actions as an integral part of the general maritime law." *Spiller v. Thomas M. Lowe & Assocs., Inc.*, 466 F.2d 903, 910 n.9 (8th Cir. 1972) (quoting *Marsh v. Buckeye S.S.*, 330 F. Supp. 972, 975 (N.D. Ohio 1971)). Rather, the recognition of such an action and then extending it to the high seas is a giant leap of faith that requires a disregard of what Congress enacted in DOHSA.

Petitioners misread *Miles* as supporting the recognition of a general maritime law survival action. Petitioners' Brief at 36-37. *Miles* was a non-DOHSA territorial waters death action, involving claims for the death of a seaman under the Jones Act which *specifically* creates a survival action. *Miles*, 498 U.S. at 33. The Court declined to allow the recover of nonpecuniary wrongful death damages under the general maritime law that were not recoverable under the Jones Act. *Id.* at 30-33. Thus, while the general maritime law permits recovery other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act.

Moreover, *Miles* declined to address whether there is a general maritime law survival action because the resolution was unnecessary to the narrow question of whether lost future earnings are recoverable in a survival action. *Id.* at 34. Petitioners ignore the central holding of *Miles* that general maritime law cannot supplement the damage scheme provided by

Congress in the Jones Act (and in DOHSA). As the Court said:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in sur-vival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Id. at 36.

Next, the Court in *Calhoun* addressed the question whether the general maritime law death action recognized in *Moragne* can preempt state wrongful death and survival statutes, where the death occurs in territorial waters. The Court found that *Moragne* did not displace state death remedies in such cases. Critical to the analysis in *Calhoun*, as in *Moragne*, was the fact that *there was no applicable federal statute*. *Calhoun*, 516 U.S. at 215. The Court specifically contrasted the *Calhoun* situation with the situations where Congress has spoken, such as in DOHSA and in the Jones Act. The Court stressed that in those situations, "there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Id.*

Finally, in *Zicherman*, the Court reaffirmed that where DOHSA governs, it governs exclusively, and it cannot be supplemented by general maritime law or otherwise. 516 U.S. at 230-31. On the basis of *Zicherman*, the Ninth Circuit in *Saavedra* correctly held:

> We are therefore compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot "supplement" Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here.

Saavedra, 93 F.3d at 554.

To the extent that some lower courts have allowed supplementation of DOHSA with nonpecuniary damages for pre-death pain and suffering under general maritime law (or a state survival statute),[27] these decisions are incorrect and based upon the same faulty reasoning as advanced by Petitioners herein. These decisions, many of them decided before *Miles* and *Zicherman*, fail to give proper deference to DOHSA and ignore that a court

> must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Miles, 498 U.S. at 27.

Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1349 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989). If the Court were now to create a general maritime survival law action for a death on the high seas, DOHSA's preemptive force would be nullified. *Id.* Any time a court creates a federal common law rule, "it risks violating *both* of the fundamental limits on the judicial branch: feder-

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[27] *See, e.g., Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3509 (U.S. Jan. 22, 1998) (No. 97-1209); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *see also Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (applying state survival statute in DOHSA action). *See also* Petitioners' Brief at 24.

alism and separation of powers." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996). The Court in *United States v. Locke*, 471 U.S. 84 (1985), stated:

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 (1981). On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962).

471 U.S. at 95; *see Zicherman*, 516 U.S. at 231; THE FEDERALIST No. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.").

The holding of the Court of Appeals below, that nonpecuniary pre-death pain and suffering damages may not be awarded to supplement the damages available under DOHSA is in accord with the long standing principles established by the Court and should be affirmed.

B. Petitioners' Policy Arguments Cannot Override a Congressional Enactment

Petitioners argue that there are "strong policy" reasons for the creation of a general maritime law survival action and that, if the Court does not create a survival cause of action, a decedent with "no dependents" would go uncompensated. Petitioners' Brief at 40-41.

The Court addressed and rejected a similar policy-based argument in *Zicherman*. In rejecting the argument that DOHSA cannot supply the substantive damage law for a death on the high seas where the Warsaw Convention also applies because it would not sufficiently deter wilful misconduct, the Court stated: "it is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence." 516 U.S. at 231; *see Dooley*, 117 F.3d at 1481 (JA 101).

The fact that at least eight States and the Virgin Islands do not allow for the recovery of pre-death pain and suffering damages (*see supra* note 26), evidences that there is no universal policy to allow the recovery of such damages. Certainly, whether to allow pre-death pain and suffering damages is a policy decision for "Congress, and not of this Court." *Zicherman*, 516 U.S. at 231; *see* C. Nagy, *The General Maritime Law Survival Action: What Are the Recoverable Elements of Damages?*, 9 U. Haw. L. Rev. 5, 76-78 (1987).

Petitioners' argument that absent a survival action a person with "no dependents" may not be compensated is baseless. The Court in *Robertson v. Wegmann*, 436 U.S. 584 (1978), in addressing the fairness of Louisiana's survivorship law pursuant to which the action survives only in favor of a spouse, children, parents or siblings, stated: "But surely few persons are not survived by one of these close relatives. . . ." *Id.* at 591-92. The Court also noted that such restrictions are not unreasonable and akin to those found in FELA and LHWCA. *Id.* at 592 n.8. Nevertheless, Petitioners urge the Court to cre-

ate an action that is contrary to a federal statute in order to benefit a hypothetical class of plaintiffs. *See Miles*, 498 U.S. at 36.

Petitioners' related argument that failure to create a survival action would motivate a wrongdoer to "prolong the personal injury litigation for years in the hopes of the injured person's demise" is absurd. Petitioners' Brief at 41. The "wrongdoer" does not escape legal liability. The injured person's spouse, parents, children and dependent relatives have a cause of action against the wrongdoer for their damages in the event of death of the injured person.

Finally, Petitioners, invoking the maritime doctrine of special solicitude, argue that the remedies to non-seafarers should be uniform with those available to seamen under the Jones Act. Petitioners' Brief at 41-42. Neither the concept of special solicitude, even if it extends to non-seafarers, nor a desire for uniformity, can be used to create an action contrary to DOHSA. *See Zicherman*, 516 U.S. at 229-31; *Higginbotham*, 436 U.S. at 624; *see also* U. Colella, *The Proper Role of Special Solicitude in the General Maritime Law*, 70 Tul. L. Rev. 227, 308 (1995) ("separation of powers concerns prevent courts from relying on expansive notions of special solicitude to subvert congressional policy judgments").

Because DOHSA is exclusive and does not allow for the recovery of nonpecuniary pre-death pain and suffering damages, the recognition of a general maritime law survival action for the high seas would undermine DOHSA. Just as the reasoning in *Moragne* compelled the conclusion that a general maritime law action is cognizable for deaths occurring in state territorial waters, *Zicherman*, *Miles*, and *Higginbotham* together establish that the general maritime law cannot undermine the Congressional policy in DOHSA.

CONCLUSION

The judgment of the Court of Appeals, that nonpecuniary damages for pre-death pain and suffering are not recoverable in a death action governed by DOHSA, should be affirmed in all respects.

Respectfully submitted,

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Dated: March 25, 1998

APPENDIX

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UNITED STATES CODE
TITLE 46 APPENDIX. SHIPPING
CHAPTER 21—DEATH ON THE HIGH SEAS BY WRONGFUL ACT

46 U.S.C. app. § 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

(Mar. 30, 1920, ch. 111, § 1, 41 Stat. 537.)

46 U.S.C. app. § 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

(Mar. 30, 1920, ch. 111, § 2, 41 Stat. 537.)

46 U.S.C. § 763. Limitations [Repealed]*

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after expiration of such period of two years the right of action hereby given shall not be deemed to have

lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

(Mar. 30, 1920, ch. 111, § 3, 41 Stat. 537.)

* (§ 763. Repealed. Pub. L. 96-382, § 2, Oct. 6, 1980, 94 Stat. 1525.)

46 U.S.C. app. § 763a. Limitations*

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

(Pub. L. 96-382, § 1, Oct. 6, 1980, 94 Stat. 1525.)

* Codification: Section was not enacted as part of act Mar. 30, 1920, known as the Death on the High Seas Act, which comprises this chapter.

46 U.S.C. app. § 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

(Mar. 30, 1920, ch. 111, § 4, 41 Stat. 537.)

46 U.S.C. app. § 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this Appendix during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the

recovery of the compensation provided in section 762 of this Appendix.

(Mar. 30, 1920, ch. 111, § 5, 41 Stat. 537.)

46 U.S.C. app. § 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

(Mar. 30, 1920, ch. 111, § 6, 41 Stat. 537.)

46 U.S.C. app. § 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

(Mar. 30, 1920, ch. 111, § 7, 41 Stat. 538.)

TITLE 46 APPENDIX. SHIPPING
CHAPTER 18—MERCHANT SEAMEN PROTECTION AND RELIEF (JONES ACT)

46 U.S.C. app. § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies,

equipment or personnel, but not including transporting those resources by [a] vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1185; June 5, 1920, ch. 250, § 33, 41 Stat. 1007; Dec. 29, 1982, Pub. L. 97-389, title V, § 503(a), 96 Stat. 1955.)

TITLE 45. RAILROADS
CHAPTER 2—LIABILITY FOR INJURIES TO EMPLOYEES (FEDERAL EMPLOYERS' LIABILITY ACT)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *but in such cases there shall be only one recovery for the same injury.*

(Apr. 22, 1908, ch. 149, § 9, as added Apr. 5, 1910, ch. 143, § 2, 36 Stat. 291.)